



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 25, 1998

The Honorable Charles R. Matthews
Chair, Railroad Commission of Texas
P.O. Box 12967
Austin, Texas 78711-2967

Letter Opinion No. 98-049

Re: Whether the Railroad Commission is
authorized to refund certain fees paid pursuant to
Natural Resources Code section 113.244 and
related questions (RQ-1063)

Dear Mr. Matthews:

You ask whether the Railroad Commission (the "commission") is authorized to refund certain fees paid by importers of odorized liquefied petroleum gas ("LPG") between 1992 and 1997 pursuant to Natural Resources Code section 113.244 as interpreted by a commission rule. We conclude that the comptroller¹ is authorized to refund fees collected by the commission through mistake of fact or law, subject to the limitations of Government Code section 403.077.

You provide the following background information: In 1991, the legislature enacted Natural Resources Code section 113.244,² which mandated the commission to impose a fee "on the first sale of odorized LPG" by requiring "[e]ach operator of a loading rack on delivery into any cargo container [to] collect from the person who purchases odorized LPG a fee."³ The purpose of these fees was to fund a special account in the state treasury, the alternative fuels research and education fund.⁴ The legislature also enacted Natural Resources Code section 113.246⁵ authorizing the commission to enact rules regarding these fees: "The commission shall adopt rules necessary for the administration, collection, reporting, and payment of the fees payable or collected under this subchapter. . . ."⁶

¹We assume that the fees at issue have been deposited in the state treasury.

²Act of May 25, 1991, 72d Leg., R.S., ch. 725, § 14, 1991 Tex. Gen. Laws 2569, 2575-76.

³*Id.*

⁴*Id.* (Nat. Res. Code § 113.243).

⁵*Id.*

⁶*Id.* (Nat. Res. Code § 113.246).

Pursuant to this authority, the commission promulgated rules, effective March 18, 1992,⁷ which, among other things, defined the term “loading rack.”⁸ You inform us that the effect of the definition was to “impos[e] the fee on imported LPG which subsequently was introduced into an underground or aboveground bulk storage facility.” At the same time, the commission adopted a rule permitting an operator of a loading rack to petition the commission for refund of fees paid to the commission in error.⁹

Several importers of odorized LPG filed suit for declaratory judgment challenging the commission’s rule defining the term “loading rack” to the extent the definition imposed a fee on imported odorized LPG. A state district court in Travis County agreed with the importers and issued a judgment containing the following declaration:

The Commission’s rule at 16 TEX. ADMIN. CODE § 15.1, with its definition of the term “loading rack,” is invalid as applied to the Plaintiffs and Intervenor because the rule effectively imposes a fee on “imported” odorized liquefied petroleum gas (“LPG”) purchased outside the State of Texas by Plaintiffs and Intervenor when the same is delivered into their storage tanks and the point of “first sale” in Texas pursuant to 16 TEX. ADMIN. CODE §§ 15.1 and 15.21 for such imported LPG is at delivery into Plaintiffs and/or Intervenor’s storage tank, or is from the bobtail or other transport truck of Plaintiffs and/or Intervenor to the storage tanks of the purchasers. The attempt by the Commission to impose the fee on all such first sales of odorized LPG within the State of Texas is beyond the statutory authority of the Commission because it requires the collection and payment of a fee that is not imposed by the enabling legislation, TEX. NAT. RES. CODE ANN. §§ 113.244 and 113.246.¹⁰

The commission appealed and the parties subsequently settled the litigation. The court of appeals granted the parties’ joint motion to dismiss and vacate the district court judgment.¹¹ In 1997, the

⁷16 T.A.C. §§ 15.1 - .2, adopted 17 Tex. Reg. 1615 (1992) (eff. Mar. 18, 1992).

⁸*Id.* § 15.1.

⁹*Id.* § 15.25, adopted 17 Tex. Reg. 1616 (1992) (eff. Mar. 18, 1992).

¹⁰*Star-Tex Propane v. Railroad Comm’n of Texas*, No. 94-13789 (201st Dist. Ct., Travis County, Tex., Aug. 19, 1996).

¹¹*Railroad Comm’n of Texas v. Star-Tex Propane*, 1997 WL 230139 (Tex. App.—Austin, May 8, 1997) (“The judgment of the trial court is vacated and the cause is dismissed.”).

legislature amended chapter 113 of the Natural Resources Code to expressly authorize the commission to assess delivery fees on imported LPG.¹²

In light of this background, you ask whether the commission has “adequate statutory authority to recognize refund requests for LPG delivery fees paid on imported LPG” prior to the effective date of the 1997 amendments. We agree with your assessment that the district court judgment, which was vacated by the appellate court, is without force and effect. While a state agency is under no obligation to voluntarily refund fees collected pursuant to a duly promulgated rule, we believe the comptroller has the authority to refund LPG delivery fees if the commission determines, in its discretion, that the fees were collected pursuant to an invalid rule and the comptroller concurs in that determination.

As noted above, Natural Resources Code section 113.246 grants the commission authority to adopt rules to administer the fee. Pursuant to that authority, the commission adopted a rule providing that “[a]ny operator of a loading rack may petition the commission for refund of fees remitted to the commission in error.” 16 T.A.C. § 15.25. This rule is consistent with Government Code section 403.077, which authorizes the comptroller to refund money collected by a state agency “through mistake of fact or law,” providing in pertinent part as follows:

(a) The comptroller may refund the amount of money collected or received by a state agency through mistake of fact or law and deposited in the state treasury, including money not due the state and money collected or received in excess of the amount required to be collected or received. The agency must make written request to the comptroller for the refund, showing the reason for and amount of the refund. At any time the comptroller may require further written evidence for the refund and may withhold payment until the comptroller is satisfied that the refund is justified.

(b) A warrant for the payment of the refund must be signed by the comptroller and shall be drawn against the fund or account into which the money was deposited. The refund shall be made from funds appropriated for that purpose.

....

(d) Unless another law provides a period within which a particular refund claim must be made, a refund claim may not be made under this section after four years from the latest date on which the amount collected or received by the state was due, if the amount was required to be paid on or before a particular date. If the amount was not required to be paid on or before a particular date, a refund claim may not be made after four years from the date

¹²See Act of May 16, 1997, 75th Leg., R.S., ch. 496, §§ 4, 5, 1997 Tex. Gen. Laws 1824, 1825-26.

the amount was collected or received. A person who fails to make a refund claim within the period provided by law waives any right to a refund of the amount paid.

In addition, the appropriations act authorizes refunds of money deposited into the state treasury "which is subject to refund as provided by law." *See* General Appropriations Act, Act of May 29, 1997, 75th Leg., R.S., ch. 1452, pt. IX, § 109, 1997 Tex. Gen. Laws 5535, 6411.

We believe that section 403.077, together with the appropriations act, authorizes the refund of fees collected by the commission "through mistake of fact or law" and deposited in the state treasury. Under section 403.077, the commission must first review a refund request, exercising its discretionary authority to determine that the fees were collected pursuant to an invalid rule and therefore were collected through a mistake of law.¹³ Upon making this determination, the commission would then forward the refund request to the comptroller. Government Code section 403.077 authorizes the comptroller to refund the fees if the comptroller determines that the refund is justified.¹⁴ The time limitations and other restrictions set forth in section 403.077 would apply. *See also id.* (appropriations act restrictions). For this reason, the comptroller must also determine that a refund request is timely before refunding fees.

You ask two additional questions. You ask whether the commission has the authority to refund interest and other expenses in addition to the actual fees paid. Government Code section 403.077 does not authorize the payment of any monies other than the funds actually collected. You do not cite any other statute, judicial decision, or attorney general opinion for the proposition that the commission or the comptroller has the discretionary authority to agree to pay interest and other expenses, and we are not aware of any. Indeed, we believe that neither the commission nor the comptroller is authorized to refund interest and other expenses in the absence of express legislative authority. *See* Tex. Const. art. VIII, § 6 ("No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law.");¹⁵ *see also* Attorney General Opinion MW-443 (1982) (effect of Tex. Const. art. VIII, § 6 is to limit authority of agency to refund fees to general law and appropriations act provisions).

You also ask whether the commission may "condition such refunds on the pass through of the refunded fees to LPG end-users." You express concern that the contested LPG fees were passed on to the ultimate consumers and that "refunding the LPG delivery fees to loading rack operators or

¹³The determination that the fees were collected through mistake of fact or law is crucial. Without such a finding, refund payments could run afoul of constitutional limitations on grants of public funds to private parties. *See, e.g.,* Tex. Const. art. III, §§ 50-52.

¹⁴Gov't Code § 403.077(a). *Cf.* Attorney General Opinion MW-367 (1981) (concluding that similar statute authorized Parks and Wildlife Department to refund fee).

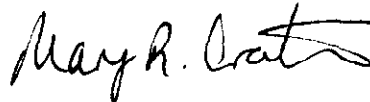
¹⁵Other refund statutes expressly provide for the payment of interest. *See, e.g.,* Tax Code § 112.060(a) (tax refunds include pro rata interest).

first purchasers without a pass through condition would clearly result in a windfall for those entities.” On its face, Government Code section 403.077 does not permit the comptroller to refund monies to anyone other than a claimant. You have not identified any other statute or rule that would authorize the commission or the comptroller to impose conditions on refunds. Nor have you identified a judicial decision or attorney general opinion suggesting that the commission or the comptroller has implied authority to impose conditions on refunds. Given that the legislature has expressly permitted the comptroller to impose conditions on tax refunds in certain Tax Code provisions,¹⁶ we do not believe such authority may be implied in section 403.077. We note, however, that neither the commission nor the comptroller is under any obligation to voluntarily refund the fees.

S U M M A R Y

The comptroller is authorized to refund fees collected by the Railroad Commission through mistake of fact or law, subject to the limitations of Government Code section 403.077.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

¹⁶*Compare* Gov’t Code § 403.077 with Tax Code §§ 111.104(f) (“No taxes, penalties, or interest may be refunded to a person who has collected the taxes from another person unless the person has refunded all the taxes and interest to the person from whom the taxes were collected.”), 112.060(e) (“The comptroller may not refund an amount of tax to a taxpayer or person who collects taxes from another person unless the taxpayer or person refunds all the taxes to the person from whom the taxes were collected.”).